IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 47315/2016

Date: 22 September 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

22/9/2016 .....
DATE SIGNATURE

In the matter between:

GAUTENG PROVINCIAL GOVERNMENT

APPLICANT

And

BOMBELA CONCESSION COMPANY (PTY) LTD

FIRST RESPONDENT

THE HONOURABLE JUSTICE CONRADIE, NO

SECOND RESPONDENT

THE HONOURABLE JUSTICE LEVINSOHN, NO

THIRD RESPONDENT

THE HONOURABLE JUSTICE MM JOFFE, NO

FOURTH RESPONDENT

JUDGMENT

PRETORIUS J,

(1) The applicant launched a stay application for the stay of proceedings before the Arbitration Tribunal on 5 October 2016 on the urgent court roll. The stay application was enrolled on the urgent court roll for the first time on 8 August 2016 and then on 30 August 2016. On 29 August 2016 I informed the attorneys of both parties that the matter cannot proceed in the urgent court as it had not been enrolled according to the Practice Directive. The attorneys attended a meeting with the Deputy Judge President on 30 August 2016. The application was removed from the roll.

(2) The parties agreed to have the review application expedited and to abandon the stay application. The review application was then placed on the roll to be heard on 15 September 2016 by a special court. I was requested to deal with the matter urgently and if necessary, only to grant an order. I have endeavoured to write the judgment and not to supply reasons at a later stage. I could do so due to both counsel for the applicant and the respondent furnishing the court with comprehensive heads of argument and oral argument.

(3) This is a review application to review and set aside the award of the

Tribunal consisting of the second, third and fourth respondents, dated 4 May 2016 in terms of section 33(1)(b) of the **Arbitration Act**[1] ("the Act").

(4) The applicant and first respondent are parties to a Concession Agreement ("the CA") which was concluded between the parties on 28 September 2006 for the design, construction, partial financing, operation and maintenance of a rapid rail system linking Tshwane, Johannesburg and OR Tambo International Airport ("the system"). System is defined in the agreement as:

> *"means (in relation to Phase 1 and Phase 2) the rapid rail public transportation system and the Dedicated Feeder and Distribution Services to be developed, operated and maintained pursuant to this Agreement including (without limitation);*
>
> *(a) the Train Sets;*
>
> *(b) all maintenance equipment and vehicles used substantially for the purposes of maintaining and/or operating the Services;*
>
> *(c) all spares and materials;*
>
> *(d) any measurement or monitoring system;*
>
> *(e) all Records and other documentation;*
>
> *(f) all things contained on any relevant asset register;*
>
> *(g) anything to be provided by the Concessionaire pursuant to the Concession Specification;*

[1] Act 42 of 1965

(h) anything in or used in the Railway Line;

(i) boundary fences; and/or

(j) computer systems and software;"

(5) The present proceedings concern the merits of the claim 3, which forms part of the main Delivery Disruption Dispute (the "DDD") in which the first respondent is claiming from the applicant an amount of approximately R450 million to R500 million for the construction of two bridges crossing the N1 at John Vorster Drive and the N14 at Jean Avenue in Centurion. The hearing of quantum-claim 3 has been scheduled to be heard from 5 October 2016 for two weeks. Hence the urgency.

CONDONATION APPLICATION:

(6) The applicant instituted the review proceedings outside the 6 week time limit stipulated in section 33(2) of the **Act**[2]. Section 33(2) provides:

> *"(2)* ***An application pursuant to this section shall be made within six weeks after the publication of the award to the parties.***" (Court emphasis)

(7) The applicant now requests condonation from the court for launching these proceedings out of time, seeking an extension of the period

[2] *Supra*

stipulated in section 33(2) of the Act. The second leg of the application is for the filing of a supplementary founding affidavit to the applicant's founding affidavit.

(8) The first respondent opposes the application for condonation and requests the court to dismiss the application.

(9) Section 38 of the Act provides that *"the court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not"*. The court has a discretion to grant such a condonation application. The court will consider the degree of non-compliance with the rules, the reasons for the non-compliance with the rules, the applicant's prospect of success in the review application and the prejudice any of the parties may suffer.

(10) To determine good cause the applicant has to have a satisfactory explanation for the late filing and serving of the application for review. The history of the serving and filing of the application for review has to be considered. The Tribunal published the award on 4 May 2016.

(11) According to the applicant, an opinion was sought from Adv Trengove SC and Adv Hassim on 13 May 2016 to determine the prospects of success. Ten days later the applicant's representatives and legal

representatives consulted with Adv Trengove SC and Adv Hassim. There is no explanation as to why it took ten days before a consultation could be held. The opinion was received by the applicant's attorney of record on 9 June 2016.

(12) The contents of the opinion have not been disclosed to the respondents or the court. Counsel for the first respondent repeatedly invited the applicant to disclose the contents of the opinion to the court, and not to the first respondent's counsel. The applicant chose not to do so as it was argued that the opinion was confidential. The applicant further neglected in both the review application and the condonation application to mention that the applicant had simultaneously requested an opinion from Adv Loxton SC. The first respondent's counsel argued that the court should make an adverse inference from the non-disclosure of the contents of the opinion of Adv Trengove SC and Adv Hassim and the fact that the applicant failed to inform the court and the respondents that it had sought a further opinion from Adv Loxton SC.

(13) After having received the opinions the applicant proceeded with the application for review. The founding affidavit in the application was signed on 14 June 2016 by Mr Jack van der Merwe and issued at court on the same date. On 14 June 2016 the papers were delivered to the office of the sheriff for service on the four respondents. The papers were returned on 17 June 2016 as the papers had not been

adequately certified. The applicant's attorney dealt with the matter and the papers were once more dispatched to the sheriff for service on 17 June 2016. Apparently the papers only reached the sheriff on 21 June 2016 and were only served on 22 June 2016 – five days out of time. It is clear from the applicant's application that the attorney did not follow-up to ascertain whether the papers were filed timeously. The explanation is that it was due to work pressure, but it is expected of a diligent attorney, in these circumstances where time is of the essence, to ensure that papers are served and filed in time. This explanation cannot be accepted. The further explanation that it was due to a misunderstanding between the attorneys and the sheriff does not take the matter any further.

(14) There is no explanation as to why a condonation application for the late filing of the papers was not launched immediately. The condonation application was only instituted on 18 August 2016 – two months after the time limit had expired on 17 June 2016. There is no explanation as to why it took 12 days from 6 August 2016, when the notice of motion was signed, until 18 August 2016 to have the application issued. I cannot find that the applicant had acted with the diligence that is required to launch the review application timeously and then wait another two months before issuing the condonation application.

(15) The review application, according to the applicant, has a great prospect of success on the merits, as the applicant had throughout maintained that the Tribunal lacked jurisdiction in the arbitration. The basis of the review is that the Tribunal misdirected itself with regards to the extent of its arbitral powers and jurisdiction. According to the applicant the first respondent had to refer the claim 3 dispute to be considered by the parties' respective Chief Executive Officers before launching the arbitration. The further complaint is that the dispute initially referred was not the same as had been pleaded. The first respondent's counsel submitted that the applicant has poor prospects of success as the jurisdictional complaint had been dealt with in the separated issues of claim 2 and the issue of *res judicata* in claim 3. The applicant had, during the hearing of claim 2, abandoned the jurisdictional challenges. The Tribunal had also dealt with clause 4.1 and 4.2 of Schedule 9 during a previous hearing. The question of jurisdiction, according to AFSA rules, must be decided by the Tribunal. In this instance, it is argued that the applicant had subjected it to the Tribunal's jurisdiction in the two separated issues, prior to the hearing of claim 3.

(16) According to the first respondent, should the court uphold the review application the first respondent would suffer irreparable harm, which is a fact the court has to take into consideration. The hearing of the question of quantum before the Tribunal will also be affected, as it has been set down for 5 October 2016 for two weeks.

(17) It is common cause that the proceedings of the approximately R500 million dispute over claim 3 has been before the Tribunal for more than three years and that the applicant had taken part in the *res judicata* hearing in respect of claim 3, thereby consenting to the Tribunal's jurisdiction. During the second separated hearing to determine the applicant's rights and obligations under clause 4 of Schedule 9 the applicant did not contend that clause 4 gave it a jurisdictional defence to claim 3.

(18) The challenge to the Tribunal's jurisdiction was only raised at the start of the claim 3 merits hearing. At that time the first respondent had spent R15 million in preparation for the hearing of claim 3.

(19) The reasons, set out by the applicant in the replying affidavit, for the review application was:

> *"11.1 The purpose of the Review application is to set aside the Award published by the Tribunal on 4 May 2016. This was following a full hearing on the merits of Claim 3 which involved many other issues than just the jurisdictional points raised in the review.*
>
> *11.2 The Province defended that claim on all those issues* ***with hope that it would succeed****.*

11.3 When it did not succeed the Province sought legal advice from Counsel who was not involved in that process." (Court emphasis)

(20) In other words, the applicant *"wants to have the best of both worlds. The law will not allow it to do so"*[3]. The applicant apparently only decided to challenge the Tribunal's jurisdiction, when it did not succeed on all the other points in the arbitration. This cannot be allowed.

(21) I find that due to the lack of prospects of success in the review application, the lack of explanation for waiting two months to launch the condonation application and the lack of adequate reasons for the late serving of the review application that the application for condonation cannot succeed.

(22) Should I be wrong in this finding, I now deal with the review application.

THE REVIEW APPLICATION:

(23) The applicant instituted review proceedings in terms of section 33 of

[3] Naidoo v EP Property Projects (Pty) Ltd [2014] ZASCA 97 at paragraph 25

the **Arbitration Act**[4] ("the Act"). Section 33(1) and (2) of the Act provides:

> *"(1) Where-*
>
> *(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or*
>
> *(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or*
>
> *(c) an award has been improperly obtained,*
>
> *the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."*

(24) The defendant is the Gauteng Provincial Government, which is represented in these proceedings by the Gautrain Management Agency, established by section 2 of the **Gautrain Management Act**[5] ("the GM Act"). The Agency's responsibility and duties in terms of the **GM Act** is the management of the Gautrain Project.

(25) The first respondent is the Bombela Concession Company (the concessionaire) who contracted as the concessionaire under the Concession Agreement ("CA") to build the Gautrain.

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[4] *Supra*
[5] Act 5 of 2006

(26) The second respondent is a retired judge of the Supreme Court of Appeal, the third respondent is a retired judge of the High Court, Kwa-Zulu Natal Division and the fourth respondent is a retired judge of the High Court, South Gauteng Division.

(27) The second, third and fourth respondents are cited in their nominal capacities as members of the arbitral tribunal established under the auspices of the Arbitration Foundation of Southern Africa (AFSA).

(28) The second respondent is currently serving as chairperson of the arbitral Tribunal against whose award the review was launched. The second, third and fourth respondents indicated that they will abide by the findings of the court.

(29) The current dispute is referred to as the "Delay and Disruption Dispute" ("DDD"). The claim pertinent to this application is claim 3 which relates to the concessionaire's construction of two bridges by way of a cantilever construction methodology. The first bridge is that of the John Vorster Viaduct ("Viaduct 5b") and the second bridge is the Jean Avenue Viaduct ("Viaduct 5d").

(30) A hearing was held in respect of the merits of claim 3 before the

Tribunal over the period of 15 to 29 February 2016 and the merits of claim 3 was argued before the Tribunal on 10 and 11 March 2016. The Tribunal's Award was published on 4 May 2016.

(31) The applicant requests the court to review and set aside the Award in terms of section 33(1)(b) of the **Act**[6] on the grounds that the Tribunal exceeded its powers in arriving at the following conclusions:

"70.1 ***In relation to the John Vorster viaduct****:*

70.1.1 on a proper interpretation of item 191.44 of the Assessment Table ***the bridge selected by SANRAL for aesthetic reasons was not the original balanced cantilever concrete bridge of the BAFO but a different balanced cantilever bridge****;*

70.1.2 ***Province was in respect of the said cantilever concrete bridge to issue a PVN****;*

70.1.3 Province's refusal to issue the said PVN constituted a Province Breach as contemplated in the Schedule 9 of the CA;

70.1.4 Province is to pay the Concessionaire compensation to be quantified in a later hearing.

70.2 ***In relation to the Jean Avenue bridge****:*

70.2.1 the Concession Specification required the

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[6] *Supra*

construction of a composite bridge as developed in the Preliminary Design;

70.2.2 ***GAUTRANS's choice of a concrete balanced cantilever bridge to replace the envisaged composite bridge does not constitute a Necessary Consent required for the construction of the said concrete balance cantilever bridge**;*

70.2.3 ***Province was contractually obligated to issue a PVN for the construction of the said concrete balanced cantilever bridge**;*

70.2.4 *Province's refusal to issue the PVN as aforesaid constituted a Province Breach as contemplated in Schedule 9 of the CA;*

70.2.5 *Province is to pay the Concessionaire compensation to be quantified in a later hearing.*

70.3 *Province's defences that the arbitral tribunal lacks the jurisdiction to arbitrate these disputes as well as its defence of waiver are dismissed.*

70.4 *Province is to pay the costs of the arbitration on the High Court scale on a party and party basis, which costs are to include the costs of two counsel, the qualifying fees of Bombela's expert witness, travel fees and disbursements for Perrier and Viallon and the translator, the arbitrator's*

fees, the costs of the AFSA venue hire and the transcription costs." (Court emphasis)

(32) The first ground was that the dispute underlying the concession claim 3 was not the claim initially referred to and considered by the respective CEO's of the applicant and the first respondent. The argument is that the first respondent had thus not complied with the provisions of clause 4.1 to 4.3 of Schedule 10 to the CA. This, according to the applicant, relates to the applicant's challenge to the jurisdiction of the Tribunal.

(33) The concessionaire had failed to notify the applicant in accordance with the provisions of clause 4.2 of Schedule 9 to the CA that it wanted the dispute determination in accordance with the provision of Schedule 9 within the period provided for in paragraph 4.2.

(34) The second ground was that the Tribunal incorrectly found that the applicant was contractually obliged to issue a Provincial Variation Notice ("PVN") for the construction of a concrete balanced cantilever bridge at the Jean Avenue Viaduct. According to the applicant the Tribunal failed to indicate which clause in the CA imposed such an obligation on the applicant, whilst the Tribunal was not entitled to do so as no such obligation arose from the CA.

(35) A Province Variation Notice is defined in the CA as:

> *"means a notice given by the Province as provided in clause 63.1.1"*

And clause 63.1.1 provides in respect of Variations:

> *"Subject to the provisions of this clause 63, the Province may by notice (the "Province's Variation Notice") to the Concessionaire at any time until eighteen (18) calendar months before the Expiry Date due to the effluxion of time request the Concessionaire to make any Variation and the Province's Variation Notice shall specify the nature and extent of the proposed Variation in sufficient detail to enable the Concessionaire to evaluate it in accordance with this clause 63."*

(36) The third ground is that the Tribunal exceeded its powers by taking into account information relative to quantum and lacking the jurisdiction to do so, as the parties had expressly agreed to exclude such information.

(37) The first respondent opposes this application, firstly on the basis that the review application is out of time. Secondly, that the challenge to the jurisdiction of the Tribunal over claim 3 is bad in law as according to the first respondent, the applicant long ago submitted to the

jurisdiction of the Tribunal over claim 3. The first respondent argues that the other complaints advanced by the applicant are unfounded and do not amount to grounds of review, but might have been grounds for appeal had the arbitration award not been final.

LEGAL POSITION:

(38) The court has an extremely limited discretion to set aside an arbitration award in terms of section 33(1) of the **Act**[7].

(39) In **Lufuno Mphaphuli v Andrews**[8], Kroon AJ confirmed the finding of the Supreme Court of Apeal in **Telcordia Technologies Inc v Telkom SA Ltd**[9] and held:

> *"In Telcordia the Supreme Court of Appeal held, inter alia, that -*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) ...*
>
> *(d) by agreeing to arbitration the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Arbitration Act and nothing else; and*
>
> *(e) by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in s*

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[7] *Supra*
[8] 2009(4) SA 529 (CC) at paragraph 65
[9] 2007(3) SA 266 (SCA)

33(1) of the Act, and, by necessary implication, they waive the right to rely on any further ground of review, 'common-law' or otherwise."

(40) In **Amalgamated Clothing & Textile Workers Union v Veldspun Ltd**[10] the court held:

*"As to misconduct, it is clear that the word does not extend to bona fide mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a Court might be moved to vacate an award;...**even a gross mistake, unless it establishes mala fides or partiality, would be insufficient to warrant interference**."* (Court emphasis)

(41) O'Regan J emphasized in **Lufuno Mphaphuli**[11] that a decision to refer a dispute to private arbitration is a choice which should be respected.[12]

(42) The court in the case of **Zhongji Construction v Kamoto Copper Company**[13] followed the English Courts in the case of **Fili Shipping Co Ltd v Premium Nafta Products and Others**[14] and the **Fiona**

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[10] 1994(1) SA 162 (A) at 169D-G
[11] *Supra*
[12] Paragraph 219
[13] 2015(1) SA 345 (SCA)
[14] [2007] UKHL 40

Trust Holding Corporation and Others v Primalov and Others[15] case and recognised the limited powers of the court in dealing with arbitrations.

(43) This underlines that the *dictum* of **Botha and Another v Rich NO and Others**[16] is applicable in this instance. I must agree with first respondent's counsel who relies on **Purser v Sales**[17] where Mpati AJA held:

> *"I find myself in respectful agreement with Theron J when he says in the William Spilhaus case, supra:*
>
> *"... I can see no reason for thinking that our Courts in general would fail to give effect to the rule of the common law as it is to be gathered from Voet, 2.1.20, as read with 2.1.18, 26 and 27,* ***that a defendant who has pleaded to the plaintiff's main claim without objecting to the jurisdiction must, at any rate after the stage of litis contestatio has been reached, be considered to have bound himself irrevocably to accept the jurisdiction of the court*** *- and this even in a case where his failure to raise the question of the jurisdiction might have been due to some mistake on his part." (1001H-1002A)."* (Court emphasis)

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[15] [2007] EWCA Civ 20
[16] 2014(4) SA 124 (CC)
[17] 2001(3) SA 445 (SCA) at paragraph 18

(44) In **Bonugli and Another v Standard Bank of South Africa Ltd**[18] the court found that by the conduct of the appellant the appellant *"unequivocally submitted to its jurisdiction"*. In the present circumstances I find that by taking part in the *res judicata* hearing and the interpretation hearing in respect of clause 4.1 and 4.2 the applicant had on a balance of probabilities submitted to the jurisdiction of the Tribunal in respect of claim 3.

(45) In **Telcordia Technologies Inc v Telkom SA Ltd**[19] Harms JA dealt with arbitration awards being set aside as follows:

> *"...'disregarded the principle of party autonomy in arbitration proceedings and failed to give due deference to an arbitral award, something our courts have consistently done since the early part of the 19th Century. This approach is not peculiar to us; it is indeed part of a worldwide tradition. Canadian law, for instance, "dictates a high degree of deference for decisions . . . for awards of consensual arbitration tribunals in particular." And the "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" have given rise in other jurisdictions to the adoption of "a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimise*

[18] 2012(5) SA 202 (SCA) at paragraph 23
[19] *Supra*

judicial intervention when reviewing international commercial arbitral awards".

(46) If I apply these principles in the matter at hand I must agree that the application of the referral provisions, clauses 4.2 and 4.3 of Schedule 10, must be interpreted widely. By doing so I find that the presumption that the parties intended that all disputes, arising from the CA, must be decided by the same Tribunal, must be taken into consideration.

(47) The primary obligations of the concession were to design and construct the Gautrain System in accordance with the Concession specification set out in Schedule 1 of the agreement. This specification could only be amended pursuant to Variation Notices issued in terms of the agreement. Clause 63 provides for Province Variation Notices ("PVN") and Concession Variant Notices ("CVN"). This review deal with PVN's. This court is fully aware of the distinction between an appeal and a review. In the **Telcordia case**[20] at paragraph 50 it was found that if a party waive its right to appeal, it waives its right to have the merits of the arbitration argued and reconsidered, which is exactly the case here.

(48) Therefor a tribunal's award, where there is no right of appeal, cannot be reviewed on the ground that it is based on an error of law or fact

[20] *Supra*

(See the **Veldspun case**[21] and **Telcordia cases**[22].

(49) In the **Telcordia case**[23], referring to **Dickenson and Brown v Fisher's Executors**[24] the Supreme Court of Appeal held at paragraph 55 that *"the general principle that when parties select an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision was"*.

(50) In the present instance I cannot find that the Tribunal erred in fact or in law, but it is clear that even if I could find that the Tribunal had erred in fact and/or law, I would not be able to adjudicate the matter as the parties chose arbitration as a dispute resolution mechanism. The applicant was to make payment for the construction project in accordance with clause 26 of the CA.

(51) When the agreement was concluded there were a number of unresolved issues which the parties attempted to regulate in an Assessment Table that was attached as a schedule to the agreement. The agreement further provided that the parties were under a duty to co-operate with one another *"in order to facilitate the performance of this agreement"*.

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[21] *Supra*
[22] *Supra*
[23] *Supra*
[24] 1915 AD 166 at 174

(52) The agreement defines the *"Dispute Resolution Procedure"* as the procedure for the avoidance and resolution of disputes as set out in Schedule 10.

(53) According to Schedule 10 when a dispute arises a party may issue a *"Notice of Dispute"* and that such a dispute be considered in accordance with the Dispute Resolution procedures as provided in Schedule 10. The *"Notice of Dispute"* is defined in Schedule 10 as:

> *"a written notice given by either the Province or the Concessionaire to the other Party notifying the other Party of the existence of a Dispute and requiring such Dispute to be considered in accordance with the Dispute Resolution procedures provided for in this Schedule 10 in accordance with this Schedule 10.* ***Such notice shall set out details of the Dispute provided that the party giving the notice shall not be bound by or limited to the details or basis of the Dispute as set out in the notice****".* (Court emphasis)

(54) Due to the last provision the Tribunal has jurisdiction to decide disputes as ultimately pleaded by the parties. Clauses 4.2 and 4.3 of Schedule 10 sets out the procedures to be followed to resolve the dispute. Clause 4.2 provides:

> *"Upon receipt by a Party of a Notice of Dispute, the Parties shall*

engage their respective chief executives (or empowered individuals) to seek an amicable settlement. Within two (2) Business Days of the service of the Notice of Dispute, the party who has served the Notice of Dispute shall provide the other Party with brief details of the matter in issue and the remedy sought and making express reference to this Clause 4.2 of Schedule 10. The Party receiving such details will issue within five (5) business days its brief response. The chief executives (or empowered individuals) will meet within ten (10) Business Days of the issue of the response to discuss the matter in an endeavour to amicably resolve the Dispute. They may use whichever means they jointly consider appropriate to resolve the dispute."

(55) In terms of clause 4.3 should the parties be unable to reach an amicable resolution, the party who issued a Notice of Dispute may issue a notice requiring that the dispute be resolved in accordance with the provisions of Schedule 10. Clause 4.8 stipulates that all other disagreements which do not constitute a dispute, shall be resolved by way of arbitration under the AFSA rules. Rule 11.1 of the AFSA Rules provides:

"The arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings, including the matter of costs."

(56) Rule 11.2.1 is relevant in the present circumstances dealing with the jurisdiction of the Tribunal:

> *"to rule on his own jurisdiction, including rulings on any dispute in regard to the existence or validity of the arbitration agreement or the scope thereof"*

(57) Article 8.1 of the Rules provides:

> *"Arbitrator to deal with jurisdictional issues*
>
> *8.1 Where the Secretariat has accepted a Request for Arbitration but a party cited as a defendant disputes that he was a party to an arbitration agreement, or that the arbitration agreement is still valid and operative, or that the claim falls within the terms of the arbitration agreement, or a defendant to a counterclaim disputes that the counterclaim falls within the arbitration agreement, an arbitrator shall be appointed in accordance with these Rules, to consider the matters so contested and decide whether or not to proceed with the arbitration, and, if he decides to proceed therewith, to do so."*

(58) Article 10.1.2 of the Rules provides:

> *"10.1.2 in cases where the party cited as defendant disputes*

that he was a party to the arbitration agreement, or that the arbitration agreement is still valid and binding, or that the claim falls within the terms of the arbitration agreement, (all of which disputes are hereinafter referred to as "jurisdictional disputes"), ***then (unless the party against whom the jurisdictional dispute is raised, informs the arbitrator that he does not wish to proceed until such dispute has been decided by a court) first decide the jurisdictional disputes, and, if he decides them against the party raising any or all of such disputes, then make a ruling for a period for the delivery of a statement of defence (if not already delivered) and counterclaim****, if any, in accordance with 6.1.5 and a statement of defence to any counterclaim in accordance with 6.4 and then proceed as set out below."* (Court emphasis)

(59) At the second separated hearing, dealing with clause 4 of Schedule 9, the award was never challenged by the applicant and is binding on the parties. The Tribunal held that clause 4.1 did not impose a time-bar on the invocation of dispute resolution proceedings and that clause 4.2 is not mandatory and found:

> *"The word 'may' connotes that it is not obligatory to do so and accordingly does not constitute a pre-condition to seeking relief in terms of the schedule."*

This award was accepted and not challenged in court at all. This

applies equally in the present matter.

(60) The applicant and the concessionaire's predecessor, the Bombela consortium concluded the Concession Agreement on 28 September 2006. At the time the agreement was signed it was unknown whether SANRAL would approve the composite steel I-beam bridges which were proposed in the preliminary design for the John Vorster bridge and the Jean Avenue bridge. This resulted in an Assessment Table attached to the CA to attempt to provide who would be responsible for the additional costs of a different bridge should a different bridge be constructed. Subsequently SANRAL rejected the composite I steel bridge and required a balanced cantilever bridge. On 30 November 2006 the concessionaire was instructed to build a balanced cantilever bridge over Jean Avenue. On 9 December 2006 SANRAL and the applicant instructed the concessionaire to build a balanced cantilever bridge over John Vorster Drive.

(61) As early as 15 December 2009 the concessionaire addressed separate letters to the applicant in respect of the two bridges and set out, *inter alia*:

> *"In view of this Province decision to vary the design provisions of the Concession Agreement our understanding is that to fulfil their contractual obligations the procedure they must follow is to issue a Province Variation Notice pursuant to Clause 63 of the*

Concession Agreement."

(62) A PVN would have entitled the first respondent to an adjustment of the price due to the increased costs of the balanced cantilever bridges.

(63) The applicant only responded to these letters more than two months later on 2 March 2007 refusing to issue the requested PVN's. On 5 April 2007 the technical details of the Jean Avenue bridge were approved at a meeting and it was decided to submit a Review In Principle to, inter alia, Gautrans, on 13 April 2007. This amounted to an approval of the preliminary design, the effect of which was to replace the design of the composite bridge in the Concession Specification with the new cantilever bridge. This bridge now became part of the Concession Specification which Bombela in terms of clause 13.1.1 of the CA became obliged to construct.

(64) It was common cause before the Tribunal that in terms of the agreement any amendment to the concession specification needed a variation notice, either from the province or from the first respondent, dependant on who amended the concession specification.

(65) Even though there existed a dispute, at the time, whether the applicant had to issue PVN's for the balanced cantilever bridges over John

Vorster Drive and Jean Avenue, the first respondent constructed the bridges. The first respondent did so in good faith and because of the express contractual obligation to co-operate with the Province to facilitate the completion of the contract. Clause 12.1[25] of the CA provides:

> *"Subject to clause 12.2 (No Relief) each Party (the "First Party") undertakes to co-operate with the other (the "Second Party") in order to facilitate the performance of this Agreement and in particular will:*
>
> *12.1.1 use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party;"*

(66) On 25 September 2009 the first respondent filed a Notice of Dispute relating to various disputes in relation to the construction project. In paragraph 2 it is set out:

> *"The Dispute between the Concessionaire and Province is at to the consequences and entitlements arising from Province's breach in relation to its obligations in relation to procurement and delivery of Land with requisite Land Use Rights and to Variations and Relevant Events, as well as from discovery of Unknown Utilities."*

And in paragraph 3(a):

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[25] Page 173

"The Concessionaire has, in numerous letters commencing from the Effective Date of the Concession Agreement, advised Province of the potential consequences of Province's breach in relation to its obligations with respect to making available the Land and procurement and delivery of the Properties with requisite Land Use Rights and to Variations and Relevant Events, as well as the extent and consequences of the discovery of Unknown Utilities, and the actual delays suffered."

(67) In the letter dated 28 August 2009 referred to by the first respondent in the Notice of Dispute it was clearly stated that the dispute in relation to John Vorster Drive was:

"58. As no final decision on the structure of the bridge was reached before the signature of the Concession Agreement, the Concessionaire agreed to study a number of alternative options to the composite I-beam structure, and the parties agreed as reflected in the Concession Agreement that 'any changes to [the Ibeam] design other than reverting to the original balanced cantilever concrete bridge of the BAFO – as a result of SANRAL's aesthetic requirements ***will require a Variation Notice from Province****.....*

59. Following various meetings between the Province, the Concessionaire and SANRAL, ***it was decided that the Concessionaire was to build a concrete balanced***

cantilever bridge at the John Vorster interchange, as recorded in the minutes of the meeting held on 7 December 2006 and confirmed in SANRAL's letter dated 19 April 2007.

60. The Concessionaire advised the Province by letter dated 15 December 2006 (ref. BOM-GPG-LET-00707) that such a change would have been implications in terms of methodology and design.

60.1 As a result of the revised balanced cantilever structure design, an additional 60m span had to be created at the Southern part of the viaduct in order to equalise the bending effect, requiring the design of an additional abutment (A5), South from Pier 6.

60.2 Furthermore, the balanced cantilever structure was all concrete and was significantly heavier than the steel beam composite solution, thus increasing the loads on the piers and foundations and resulting in an increase of their size.

60.3 In addition, the construction of the balanced cantilever structure required permanent construction tower cranes to be erected at the sides of the piers which meant that more land had to be procured and delivered.

....

63. *The decision to change the composite bridge to a balanced cantilever bridge introduced architectural requirements which were not originally contemplated in the CA."* (Court emphasis)

And the Jean Avenue dispute:

"103. However, in a letter from the Gauteng Provincial Government, the Department of Public Transport Roads and Works (identified as a party to the Concession Agreement) ***dated 13 November 2006, the Concessionaire was requested to modify the design of viaduct 5d and construct a balanced cantilever bridge in reinforced concrete***. (Court emphasis)

104. As a result the Concessionaire directed a letter to the Province on 15 December 2006 (ref. BOM-GPG-LET.00708), to request the Province to issue a ***Province's Variation Notice in order*** *for the requested changes to the design and methodology to be contractually recorded in the Concession Specification.*

105. In the same letter, the Concessionaire also advised the Province of the consequences arising out of this change, including, amongst others, the additional geotechnical investigation required, the preliminary design to be entirely re-done and the change in the alignment.

106. The Province did not issue any Province's Variation

Notice." (Court emphasis)

(68) It was thus clear that already on 25 September 2009 the first respondent alerted the applicant and set out that due to the variation from the I steel bridges to the balanced cantilever bridges that the first respondent had been put to extra cost and that the first respondent would be seeking compensation for these variations. In both instances the first respondent requested Province Variation Notices.

(69) The first statement of claim was filed by the first respondent on 29 July 2011. The claim appeared under claim 4 and alleged that an instruction issued by the applicant on 30 November 2006 should be read as a variation notice.

(70) The applicant filed its statement of defence ten months later, on 21 May 2012. In this statement of defence the Tribunal's jurisdiction was challenged on the basis that the dispute had not first been referred for amicable resolution in terms of clause 4.1 and 4.3 of Schedule 10.

(71) It was further alleged in the alternative that claim 4 was *res judicata* as it had been determined in the arbitration in the Record of Decision dispute.

(72) On 26 April 2013 the first respondent amended its claim and the claim relating to the two relevant bridges was now claim 3. The allegation was that the applicant did not issue PVN's in respect to the design changes. According to the first respondent this was a breach of contract that entitled the first respondent to damages.

(73) On 8 November 2013 the applicant filed its amended statement of defence where in paragraph PA8 Page 1438 and PA9 page 1695 the applicant withdrew the challenge to the jurisdiction of the Tribunal over claim 3, but raised challenges to the jurisdiction of the Tribunal over claim 2, which were unrelated to claim 3. The applicant, however, persisted in the plea of *res judicata* against claim 3.

(74) On 4 December 2013 the Tribunal issued an award which separated certain issues, namely the special plea of *res judicata* to claim 3, the interpretation of clause 4 of Schedule 9 and challenging the Tribunal's jurisdiction to several of the claim 2 subsections.

(75) In April 2014 the Tribunal held a hearing on the *res judicata* defence to claim 3. I must agree with first respondent's counsel that by partaking in that hearing the only inference this court can draw is that the applicant subjected itself to the jurisdiction of the Tribunal over claim 3.

(76) The Tribunal handed down its award on 30 June 2014 dismissing the applicant's plea of *res judicata*. It is telling that the applicant does not take issue that the Tribunal did not have the necessary jurisdiction to deal with this special plea and to hand down an award. No review application followed the publishing of this award.

(77) In the second separated hearing the issues that had to be adjudicated were the interpretation of clause 4 of Schedule 9, as the applicant had abandoned its jurisdictional objections in respect of claim 2's sub-claims. The Tribunal handed down its award on 3 July 2015 and held that paragraph 4.1 of Schedule 9 did not operate as a time bar and that paragraph 4.2 of Schedule 9 created a dispute resolution procedure which the parties were not obliged to follow, as has been set out earlier in this judgment. There was no mention at the second separated hearing that failure to comply with clause 4.2 of Schedule 9 precludes a referral to arbitration under Schedule 10 and raises a jurisdictional issue.

(78) The first respondent filed two subsequent amendments to its statements of claim on 23 May 2014 and 3 August 2015 respectively. On 2 October 2015 the applicant pleaded to both amendments and there was no express challenge to the jurisdiction of the Tribunal in claim 3. The applicant, however, pleaded an alternative defence of prescription to the merits of claim 3.

(79) The first respondent brought an application in November 2015 to separate merits and quantum in the claim 3 hearing. This application was opposed by the applicant and one of the grounds of opposition was that the first respondent had introduced matters of quantum in paragraphs 30 and 31 of the replying witness statements. The first respondent undertook not to rely on these paragraphs at the merits hearing. The separation was granted.

(80) On 15 February 2016 the applicant, for the first time, sought determination of the allegations contained in paragraphs 298 – 300 of the second amended statement of case of the first respondent. The heading indicated *"The defendant's alternative defence of prescription"* and did not indicate a challenge, to the jurisdiction of the Tribunal.

(81) The Tribunal dealt with this late attempt to question the Tribunal's jurisdiction as follows at the hearing:

> *"CHAIRPERSON: Well, this point I see is raised in amended papers dated October 2015.*
>
> *MR LOXTON SC: Yes.*
>
> *CHAIRPERSON: Was that when it made its first appearance?*
>
> *MR LOXTON SC: I don't know.*
>
> *CHAIRPERSON: The point about the reference?*

MR LOXTON SC: I'm afraid, - I can find the answer.

CHAIRPERSON: It was pleaded in October 2015, so presumably it was thought of either then or shortly before October 2015, but wasn't that too late?

MR LOXTON SC: I may well be.

CHAIRPERSON: I mean by that time the parties had already been to refer claim number 3 to arbitration, to us, and quite apart from that it seems to me to be undesirable in an arbitration to take a point like this.

MR LOXTON SC: At that stage.

CHAIRPERSON: It is like ducking the issues.

MR LOXTON SC: Yes, that may be the answer..."

(82) After refusing to deal with this question separately the hearing proceeded. During oral argument the applicant made no attempt to advance this jurisdictional complaint and the issue of jurisdiction was not part of counsel's argument before the Tribunal.

(83) Prior to the hearing on 15 February 2016 there was no indication on the pleadings that the applicant intended dealing with the prescription argument as a jurisdictional point as a result of pleading prescription in paragraphs 298 – 300. The second statement of defence does not contain the word *"jurisdiction"* and there is no allegation to challenge the Tribunal's jurisdiction. It is important to note that the applicant in

the first amended statement of defence dated 8 November 2013, had abandoned the challenge to the jurisdiction of the Tribunal over claim 3 that it had raised to the corresponding claim 4 in the original statement of defence it had filed on 21 May 2012. This confirmed the Tribunal's and the applicant's belief that the Tribunal's jurisdiction over claim 3 was no longer an issue and that the applicant had subjected itself to the jurisdiction of the Tribunal.

(84) The applicant, on 4 December 2013, requested the Tribunal to deal with the *res judicata* issue separately in respect of claim 3. This was done and the applicant had participated fully in the *res judicata* hearing on claim 3 in April 2014 and did not take issue with the Tribunal's jurisdiction at the time and neither complained of the Tribunal's lack of jurisdiction on 30 June 2014 when the award of the Tribunal was handed down. The only conclusion I can come to is that the applicant acknowledged the Tribunal's jurisdiction when dealing with the issue of *res judicata* in respect of claim 3. The same applies to the second separated hearing where the interpretation of clause 4.1 and 4.2 of Schedule 9 was determined on 3 July 2015 as the applicant did not raise the objection that the first respondent had to comply with these clauses, before referring the dispute under Schedule 10 and did not raise this as a jurisdictional issue.

(85) AFSA Rule 10.1.2 requires jurisdictional disputes to be determined in

advance of all other disputes. The reason for this is evident as found in **Naidoo v EP Properties**[26] where Bosielo JA found:

> *"It is common cause that this attack was not raised on the papers in the litigation preceding the order by Moosa J, nor in answer to the statement of case or in evidence before the arbitrator.* ***Any complaint about the arbitrator's lack of jurisdiction being potentially dispositive of the matter should have been raised at the beginning of the arbitration as a point in limine. This was never done****. Instead, Tobias participated in the arbitration proceedings until December 2009 when he unsuccessfully applied for a postponement. It is common cause that Tobias was until then represented by an attorney and counsel. In those circumstances it is safe to infer that he participated knowingly and voluntarily in the arbitration proceedings. In this regard the following dictum by Gauntlett AJ in Abrahams v RK Komputer SDN BHD 2009 (4) SA 201 (C) at 210E-F is apposite:*
>
> *'If, as her affidavit would have it, it is the latter, it does not avail her now – disgruntled by the results – to fossick in the procedural ashes of the proceedings and to disinter her perception when it suits. An attack based on bias – with its devastating legal consequences of nullity – is not to be banked and drawn upon later by tactical choice. As the Court of Appeal in England has put it,*

[26] [2014] ZASCA 97 at paragraph 25

> *"**It is not open to [the litigant] to wait and see how her claims ... turned out before pursuing her complaint of bias ... [she] wanted to have the best of both worlds. The law will not allow her to do so**."'*
>
> *This is exactly what Tobias did in this case. Instead of objecting to the jurisdiction of the arbitrator at the beginning, he participated in this protracted arbitration until the proverbial shoe started to pinch."* (Court emphasis)

And in the **Zhongji Construction case**[27] where Gorven AJA confirmed:

> *"**When a party raises a challenge to the jurisdiction of a court, this issue must necessarily be resolved before any other issues in the proceedings**. The reason is simple. If the court has no jurisdiction, it is precluded from dealing with the merits of the matter brought to it."* (Court emphasis)

I find that it was reasonable of the first respondent and the Tribunal to accept that the issue of jurisdiction was no longer an issue as the applicant had subjected itself to the Tribunal's jurisdiction during the *res judicata* hearing relating to claim 3. The abovementioned *dictum* is applicable in the present instance.

(86) The case of **Botha and Another v Rich NO and Others**[28] is relevant

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[27] *Supra* at paragraph 50
[28] *Supra*

where Nkabinde J held:

> *"Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests.* ***Good faith is the lens through which we come to understand contracts in that way****."* (Court emphasis)

(87) In the present instance the applicant had not acted in a way that shows the contractual principle of good faith. The first respondent had expended close to R15 million on legal expenses on the merits of the claim 3 dispute. Belatedly the applicant sought to have a jurisdiction dispute determined on 15 February 2016. It is clear that in paragraph 12.1 of the CA the CA expressly provided under Obligations that:

> *"Subject to clause 12.2 (No Relief) each Party (the "First Party") undertakes to co-operate with the other (the "Second Party") in order to facilitate the performance of this Agreement and in particular will:*
>
> *12.1.1 use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party;"*

The first respondent had acted in good faith and had built the two cantilever bridges as requested by the applicant, despite not receiving

the relevant PVN's.

PROVINCE VARIATION NOTICE (PVN):

(88) The Tribunal found that the Variation Notice to be issued was a Province Variation Notice and the applicant is liable for the costs of the variation. This is the reason for the applicant's application for review as it contends that no PVN was necessary in either of the variations of the two bridges.

(89) The Tribunal, according to the Tribunal, had to determine the following:

> *"Despite there having been no variation, the Jean Avenue bridge built and handed over by the Concessionaire was built in terms of the new specifications for the cantilever bridge. The question is who has to pay for its construction."*

(90) In the award the Tribunal found that the applicant was contractually obliged to issue a PVN for the construction of the Jean Avenue bridge, as well as the John Vorster bridge. The failure by the applicant to do so constituted a breach of the CA and the Tribunal would determine the compensation that the applicant has to pay at the quantum hearing of 5 October 2016.

(91) The remedy sought by the applicant at the time was that the first

respondent should have refused to construct anything but the twin I-beam bridge or to have downed tools. This would have been in breach of paragraph 12.1 of the CA and contrary to the behaviour expounded by Nkabinde J in the **Botha case**[29].

(92) The applicant further argued that the Tribunal had relied on the excluded quantum data and consideration when considering the facts. I have read the award thoroughly in this regard and can find no reliance by the Tribunal on paragraphs 30 and 31 of the first respondent's replying witness statement. I find that the issue was who of the parties were liable for the deviations to the construction of the Jean Avenue and John Vorster Drive bridges. The Tribunal considered the background circumstances to enable the Tribunal to properly understand the agreement. There was no untoward decision in respect to the quantum of the application. Therefore this ground of review is dismissed.

(93) The applicant filed supplementary heads of argument on 13 September 2016 which the applicant did not argue at the hearing of the review, but indicated that the applicant did not abandon the ground of review. I have dealt with the averments that the Tribunal had taken into consideration the issue of costing and pricing of the bridges. These arguments have been dismissed by me and take the matter no

[29] *Supra*

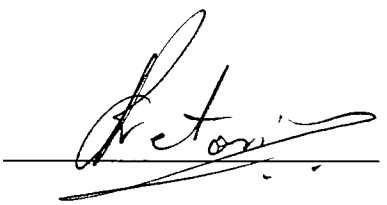
further.

(94) I am requested to grant a punitive costs order to show the court's disapproval at the manner this review application was launched. On 8 August 2016 the application for the stay of the arbitration was struck from the roll as the matter had been enrolled in a manner inconsistent with the provisions of the Practice Manual. Once more the applicant placed the second stay application on the urgent roll of 30 August 2016 not heeding Rabie J's note on 8 August 2016 to approach the Deputy Judge President for a special date. The Deputy Judge President directed that the matter being heard on 15 September 2016. No reason is set out why the condonation application was only served on 18 August 2016, after the notice of motion had already been signed on 6 August 2016. The replying affidavit in the condonation application was only served on 7 September 2016 together with the heads of argument after the time to do so, according to the court's instructions, had expired. Both the court and the first respondent have been inconvenienced to a great extent by the conduct of the applicant.

(95) In the result I make the following order:

1. The condonation application is dismissed with costs, on an attorney and client scale, including the costs of two counsel;
2. The review application is dismissed with costs on an attorney and client scale, including the costs of two counsel;

3. The applicant is directed to pay the first respondent's costs related to the two interim stay applications, including the costs of the appearances on 8 August 2016 and 30 August 2016 on an attorney and client scale, including the costs of two counsel.



Judge C Pretorius

Case number	: 47315/2016
Matter heard on	: 15 September 2016
For the Applicant	: Adv EC Labuschagne SC
	Adv MPD Chabedi
Instructed by	: Ledwaba Mazwai Attorneys
For the Respondent	: Adv A Bham SC
	Adv M Chaskalson SC
	Adv E Webber
Instructed by	: Tiefenthaler Attorneys
Date of Judgment	: 22 September 2016